William Mitchell Law Review

Volume 27 | Issue 3 Article 15

2001

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IN THE INTEREST OF JUSTICE: GRANTING POST-CONVICTION DEOXYRIBONUCLEIC ACID (DNA) TESTING TO INMATES

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1. U.S. DEP'T OF JUSTICE, PUB. NO. 177626, *infra* note 19.

I. INTRODUCTION

James Watson and Francis Crick "unraveled" the structure of DNA in 1953.[2] Since then, DNA typing (profiling, fingerprinting, testing) has overcome controversy and criticism and revolutionized the criminal justice system.[3] In the process, DNA testing has freed at least sixty-three innocent men originally convicted of murder or rape.[4]

When DNA analysis was first introduced, prosecutors sought to use the testing to confirm they had the right man and ultimately introduce the results at trial to increase the chances of securing a guilty verdict. Since first being used by prosecutors, the technology has significantly advanced, and more sophisticated DNA testing is now available. As a result, there are numerous inmates across the country that did not have this testing available to them at the time of their convictions and are now attempting to gain access to DNA profiling to prove their innocence. Allowing an inmate access to post-conviction DNA testing has drawn criticism from some in the legal community, support from some against the death penalty and raised numerous legal issues. This comment will first explore the history of DNA analysis/testing and its introduction into the courtroom.[5] Then it will discuss the legal issues surrounding a defendant's request for post-conviction DNA testing.[6] It will go on to explore post-conviction testing in Minnesota.[7] Finally, this comment will discuss various steps being taken to provide a defendant with the right to post-conviction DNA testing.[8]

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2. Denise A. Filocoma, Comment, *Unraveling the DNA Controversy: People v. Wesley, A Step in the Right Direction*, 3 J.L. & POL'Y 537, 540 (1995).

3. *Id.*

4. Robert Tanner, *Death Row Releases Raise Issues of Justice*, DETROIT NEWS, Feb. 9, 2000, at A9, *available at* http://www.detnews.com/2000/nation/0002/09/02090161.htm. Illinois is responsible for fourteen post-conviction DNA exonerations and New York is responsible for seven. Alicia Montgomery, *Angels of Justice* (Mar. 17, 2000), *at* http://www.salon.com/news/feature/2000/03/17/scheck/index.html.

5. *Infra* Part II.

6. *Infra* Part IV.

7. *Infra* Part V.

8. *Infra* Part VI.

II. THE HISTORY OF DNA ANALYSIS AND ITS INTRODUCTION IN THE COURTROOM

Early forms of biological identification techniques were often referred to as unreliable.[9] For example, one method of testing used in the 1960's was called "genetic marker analysis."[10] This form of analysis was effective only on certain blood types, which did not make genetic marker analysis a valuable form of testing in most circumstances.[11] Additionally, the testing was unsuccessful in most cases due to deterioration of the sample.[12] Furthermore, it was possible the genetic marker analysis would result in a false conclusion.[13] Another early form of scientific analysis was the electrophoretic method of testing that typed polymorphic proteins.[14] Again, this method resulted in inconsistent results.[15]

DNA analysis of hair, saliva, blood, skin tissue and semen is the most significant advance in the history of scientific evidence.[16] Deoxyribonucleic acid ("DNA") "codes genetic information for the transmission of inherited traits."[17] The function of DNA is to store all information necessary to create a human being along with all traits unique to that human being.[18] The two most common types of DNA tests are Restriction Fragment Length Polymorphism Analysis ("RFLP") and Polymerase Chain Reaction Amplification

9. *Infra* notes 10-15.

10. NAT. INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, PUB. NO. 161258, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL xv (1996) [hereinafter U.S. DEP'T OF JUSTICE, PUB. NO. 161258]. The names of the tests used were the Lattes test, the absorption-elution test and the absorption-inhibition test. *Id.*

11. *Id.* Only ABO blood group substances and ABO isoantibodies could be detected. *Id.* ABO typing, which is a form of electrophoresis testing, was used to obtain the conviction of Joseph O'Dell. Lori Urs, *Commonwealth v. Joseph O'Dell: Truth and Justice or Confuse the Courts? The DNA Controversy*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 311, 315 (1999). O'Dell was executed despite the controversy surrounding the reliability or lack thereof of the testing used. *Id.* at 315.

12. U.S. DEP'T OF JUSTICE, PUB. NO. 161258, *supra* note 10, at xv.

13. *Id.*

14. *Id.*

15. *Id.*; Urs, *supra* note 11, at 312-13.

16. U.S. DEP'T OF JUSTICE, PUB. NO. 161258, *supra* note 10, at xv, xix, 4.

17. David Williams, *DNA Evidence Presents Opportunities and Challenges for Criminal Lawyers, at* http://www.cnn.com/LAW/ trials.and.cases/case.files/0006/ deathpenalty/dnaincourt.html (last visited Jan. 25, 2001). *See also* Deborah F. Barfield, Comment, *DNA Fingerprinting-Justifying the Special Need for the Fourth Amendment's Intrusion Into the Zone of Privacy*, 6 RICH. J.L. & TECH. 27, 8 (2000).

18. Barfield, *supra* note 17, at 8.

Analysis ("PCR").[19] Additionally, the newest form of DNA testing used is referred to as STR testing ("short tandem repeat" polymorphisms).[20]

Use of DNA testing to obtain a criminal conviction first occurred in Great Britain in 1986 where Colin Pitchfork became the first person convicted on DNA evidence.[21] The first conviction in the United States based on DNA evidence occurred in 1988 in *Andrews v. State*.[22] However, it was not easy for DNA to make its way into the courtroom. From the beginning, DNA analysis and its use in the courtroom struggled to gain acceptance. Reluctance to accept the testing and allow DNA in the courtroom resulted mainly from the lack of reliability in the early form of tests.[23]

The first significant obstacle DNA analysis had to overcome was the admissibility of such scientific evidence in a criminal proceeding.[24] Beginning in 1923, the federal courts followed the stan-

19. NAT. INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, PUB. NO. 177626, POST-CONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 26-27(1999)[hereinafter U.S. DEP'T OF JUSTICE, PUB. NO. 177626]. RFLP testing was developed by Alec Jeffreys of Leicester University in 1985. *Id.* at 26. PCR testing was developed by Dr. Kary Mullis in 1984. *Id.* at 27. PCR testing can generate reliable results from very small amounts of DNA. *Id.* Both forms of testing are widely used and accepted in the courts. *Id.*

20. Ronald Bailey, *Unlocking the Cells*, Reason Online (Jan. 2000), *at* http://www. reason.com/0001/fe.rb.unlocking.html.

21. Filocoma, *supra* note 2, at 567 n.18; U.S. DEP'T OF JUSTICE, PUB. NO. 177626, *supra* note 19, at 1. Dr. Alec J. Jeffreys worked with police on this case. *Id. But see* U.S. DEP'T OF JUSTICE, PUB. NO. 161258, *supra* note 10, at 4 (stating Robert Melias was the first person convicted primarily on DNA evidence in 1987).

22. 533 So.2d 841 (Fla. Dist. Ct. App. 1988). The prosecutor presented DNA fingerprint evidence at trial and the trial court admitted the evidence. *Id.* at 842. At the time of Andrews' appeal, there were no prior appellate court decisions regarding the admissibility of DNA. *Id.* at 843. The admissibility of DNA was upheld. *Id.* at 850.

23. *See supra* notes 9-15 and accompanying text.

24. *See generally* United States v. Jakobetz, 955 F.2d 786, 786 (2nd Cir. 1992) (conducting eight days of pretrial hearings on the admissibility of DNA profiling, the court allowed the results to be presented to the jury); United States v. Gaines, 979 F. Supp. 1429, 1430 (S.D. Fla. 1997) (requiring government to make showing under *Daubert* as precondition to the admissibility of PCR DNA analysis); United States v. Young, 754 F. Supp 739, 741 (D.S.D. 1990) (determining the admissibility of DNA evidence includes considering whether the evidence is generally accepted in the scientific community, whether testing procedures used were generally accepted as reliable, whether the tests were performed properly, whether evidence is more prejudicial than probative, and whether the statistics used are more probative than prejudicial); State v. Schwartz, 447 N.W.2d 422, 422 (Minn. 1989) (holding DNA test results are admissible if performed in accordance with appropriate

dard set in *Frye v. United States*.[25] The *Frye* standard, which applies to all scientific evidence, stated that in order for scientific evidence to be admissible, the evidence had to be generally accepted by the scientific community in which it was relevant.[26] Even though *Frye* was a federal holding, the standard was adopted by most jurisdictions, including Minnesota.[27] In 1993 the Supreme Court abandoned *Frye* and adopted the *Daubert* standard.[28] *Daubert* moved to a standard that required the evidence to be relevant and reliable.[29]

Since the development of the *Frye* and *Daubert* standards, most jurisdictions have addressed the issue of admissibility of DNA tests on one level or another.[30] The West Virginia Supreme Court was the first state supreme court to rule on the admissibility of DNA analysis.[31] Additionally, one of the first courts to challenge the admissibility of DNA was the New York Supreme Court in *People v. Castro*.[32] Since its inception, scientists have made significant advances in DNA analysis, which have resulted in its increased acceptance in the criminal justice system.[33] "The state of the profiling

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laboratory standards and controls); People v. Castro, 545 N.Y.S.2d 985, 985 (N.Y. Sup. Ct. 1989) (holding the admissibility of DNA is dependent upon findings that the expert performed scientifically accepted tests and used generally accepted techniques).

25. 293 F. 1013 (D.C. 1923).

26. *Id.* at 1014. "[W]hile courts will go a long way in admitting expert testimony deducted from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.*

27. *See infra* notes 145-48 and accompanying text.

28. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993) (overruling the *Frye* standard, the court held "general acceptance" is not necessary).

29. *Id.* at 597. The Federal Rules of Evidence preclude *Frye*; thus, the Rules provide the standard for admitting expert scientific testimony in a federal trial. *Id.* The standard is that the evidence must be both relevant and reliable. *Id.*

30. U.S. DEP'T OF JUSTICE, PUB. NO. 161258, *supra* note 10, at 6-7. Forty-six states admit DNA evidence in criminal proceedings; in three states (Nevada, Oklahoma and Tennessee) statutes require admission; and forty-three states have ruled on the technology. *Id.*

31. State v. Woodall, 385 S.E.2d 253, 259 (W. Va. 1989). The court held DNA typing analysis was reliable, generally acceptable and, therefore, admissible. *Id.* at 260.

32. 545 N.Y.S.2d 985 (N.Y. Sup. Ct. 1989). The *Castro* court used a three-prong test to determine admissibility: the proposed DNA testing must be generally accepted in the scientific community; the laboratory techniques must be generally accepted in the scientific community; and the laboratory must have performed the tests in accordance with the accepted scientific techniques. *Id.* at 987. The DNA tests were found inadmissible for failure to satisfy the third prong. *Id.* at 997-98.

33. U.S. DEP'T OF JUSTICE, PUB. NO. 177626, *supra* note 19, at 1.

technology and the methods for estimating frequencies and related statistics have progressed to the point where the admissibility of properly collected and analyzed DNA data should not be in doubt."[34] To date, DNA test results are admissible in all jurisdictions.[35]

When DNA testing was introduced to the criminal justice scene, prosecutors saw it as a powerful tool to assist in the conviction and incarceration of the guilty. Over the last few years, DNA analysis has become a powerful tool to the defense to exonerate those who have already been convicted. Using DNA testing at the post-conviction stage is a controversial issue that raises both procedural and substantive questions.

III. POST-CONVICTION TESTING TO THE FOREFRONT

Post-conviction DNA testing moved to the forefront and became a prominent legal issue in 1996. It was in 1996 that the U.S. Department of Justice published a report that detailed the stories of twenty-eight men who had been exonerated through post-conviction DNA testing.[36] These twenty-eight men served a total of

34. U.S. DEP'T OF JUSTICE, PUB. NO. 161258, *supra* note 10, at 6.

35. U.S. DEP'T OF JUSTICE, PUB. NO. 177626, *supra* note 19, at 1.

36. U.S. DEP'T OF JUSTICE, PUB. NO. 161258, *supra* note 10, at 2. The twenty-eight cases were tried in fourteen states and the District of Columbia. Most cases took place in the 1980's, the earliest in 1979 and the most recent in 1991. All twenty-eight cases involved some form of sexual assault; six also included murder. All alleged assailants were men and all victims were women. All but one was tried before a jury. Police had knowledge of fifteen defendants prior to their arrests. *Id.* at 12-14. Since the publication of the report, more than forty similar cases have been identified. U.S. DEP'T OF JUSTICE, PUB. NO. 177626, *supra* note 19, at iii. Clyde Charles was set free December 17, 1999, after nineteen years behind bars after DNA testing showed he was innocent of the rape he was convicted of. Richard Zitrin, *DNA Clears Man of Rape, Points to Brother, at* http://www. apbnews.com/newscenter/breakingnews/20. . ./dna0411_01.html (n.d.). Neil J. Miller served ten years behind bars for a rape and robbery that he was ultimately cleared of after DNA testing proved his innocence. Susan Wessling, *Man Cleared After Decade in Prison, at* http://www.apbnews.com/newscenter/bre.../dnarelease 0511_01.html (n.d.). DNA testing was not available at the time of his trial. *Id.* Kevin Lee Green was released after spending seventeen years in prison for murdering his wife and unborn child when DNA confirmed another man had committed the crime. U.S. DEP'T OF JUSTICE, PUB. NO. 177626, *supra* note 19, at 32. A.B. Butler spent sixteen years in a Texas prison before being released this year after DNA tests confirmed his innocence. Sharon Cohen & Paul Shepard, *DNA Tests Clear Scores of Felons*, MINNEAPOLIS STAR TRIB., Oct. 8, 2000, at A29. After sixteen years in prison, DNA tests recently proved Carlos Lavernia's innocence. Lisa Falkenberg, *Judge: DNA Clears Rape Convict*, MINNEAPOLIS STAR TRIB., Oct. 11, 2000. Carlos is still in prison

197 years in prison for crimes they did not commit.[37] Three of the twenty-eight men were sentenced to die, including Kirk Bloodsworth who became the first death row inmate in the United States to be released based on post-conviction DNA testing.[38] Bloodsworth and the other twenty-seven men owe their releases to the technological advancements of DNA analysis and to the willingness of the courts to create a procedural process by which the convict was allowed to pursue post-conviction testing in the first place.

The findings in the U.S. Department of Justice report alarmed both the scientific community and the criminal justice system.[39] Further, it caused Attorney General Janet Reno to establish the National Commission on the Future of DNA Evidence.[40] The early requests for post-conviction testing left jurisdictions scrambling to develop a procedure for handling post-conviction DNA testing requests. While some jurisdictions are in the process of developing statutes to handle requests, Arizona, Illinois, Minnesota, New York, Oklahoma and Washington currently have statutes in place that specifically address post-conviction DNA testing.[41]

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awaiting a final decision on whether or not he will be released from court. *Id.*

37. U.S. DEP'T OF JUSTICE, PUB. NO. 161258, *supra* note 10, at 12. The longest time served was eleven years and the shortest was nine months. *Id.*

38. *Id.* at 13-14. The three men are Kirk Bloodsworth, Rolando Cruz and Alejandro Hernandez. *Id.* When Kirk Bloodsworth was found innocent, the State of Maryland paid him $300,000 for wrongful imprisonment. Raju Chebium, *Kirk Bloodsworth, Twice Convicted of Rape and Murder, Exonerated by DNA Evidence, at* http://www. cnn.com/2000/LAW/06/20/bloodsworth.profile/.

39. The fact that twenty-eight real people were innocent, yet were convicted, could not be ignored. The report clearly demonstrated that our criminal justice system is less than perfect. Post-conviction DNA testing is what is used to correct the injustices that occurred, but what flaws in the system caused the wrongful convictions to happen in the first place? Mistaken eyewitness identification, coerced confessions, unreliable forensic laboratory work, law enforcement conduct and ineffective representation of counsel all contribute to wrongful convictions. U.S. DEP'T OF JUSTICE, PUB. NO. 161258, *supra* note 10, at xxx.

40. U.S. DEP'T OF JUSTICE, PUB. NO. 177626, *supra* note 19, at iii.

41. ARIZ. REV. STAT. ANN. § 13-4240 (West 2000); 725 ILL. COMP. STAT. 5/116-3(a) (West 1992); MINN. STAT. § 590.01 (1996); N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney Supp. 1995); OKLA. STAT. ANN. tit. 22 § 1371.1 (West 2000); WASH. REV. CODE ANN. § 10.73.170 (West 2000). In 1994, New York was the first state to implement a law dealing directly with post-conviction DNA testing. *Development in Law-Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1557, 1573 (1995) [hereinafter *Development in Law*] (referring to N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney Supp. 1995)). New York's statute applies only to inmates convicted prior to 1996. *Id.* Additionally, the statute does not allow any convict access to testing. *Id.* The statute states that testing shall be granted if evidence containing DNA was collected in connection with the conviction and there must

IV. THE LEGAL ISSUES RAISED WHEN AN INMATE MAKES A REQUEST FOR POST-CONVICTION DNA TESTING

A. *How Does A Request Fit Into The Procedural Process?*

Despite the numerous requests by inmates for post-conviction DNA testing, courts are still struggling with how to classify such a request. One of the first courts to wrestle with the issue was in New York in *Dabbs v. Vergari*.[42] Since then, other jurisdictions have struggled with requests for post-conviction DNA testing.[43] Whether the request is viewed as an exculpatory evidence issue or a newly discovered evidence issue, certain standards need to be adopted for use by trial courts in determining when, or if, a defendant should be allowed to obtain the post-conviction testing.[44]

Due to the lack of precedent courts have to follow, requests for post-conviction DNA testing have generally been handled on a case-by-case basis.[45] Procedurally, requests for post-conviction testing

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be a reasonable chance that the verdict would have been more favorable to the defendant if DNA tests had been conducted at the time of the trial. *Id.* Tennessee is another state that has passed a law allowing for some post-conviction testing. Richard A. Oppel Jr., *States Move Towards Easing Obstacles to DNA Testing*, N.Y. TIMES, June 10, 2000, at A8. California allows inmates to seek testing if the DNA testing technology was not available at trial and requires officals to preserve biological evidence. *Id.* Texas recently introduced legislation similar to California. *Id.* In Washington the statute allows testing only to those on death row or serving life sentences without parole. *Id.* Further, it is left to the prosecutors discretion whether to allow the testing in the first place. *Id.*

42. 570 N.Y.S.2d 765 (N.Y. 1990). The court held Dabbs was allowed to conduct post-conviction DNA testing. *Id.* at 769. The court treated such a request as a post-conviction motion for discovery. *Id.* at 767. The DNA tests confirmed Dabbs was not the right person. *Id.* at 769. The Supreme Court of Westchester County, New York, decided on first impression that a technological advance of DNA analysis nine years after trial that rendered exculpatory results justified vacating Dabb's conviction. People v. Dabbs, 587 N.Y.S.2d 90, 91 (N.Y. 1991).

43. *See generally* State v. Thomas, 586 A.2d 250, 252-53 (Super. Ct. App. Div. 1991) (granting defendant opportunity to conduct post-trial DNA testing based on scientific and judicial developments of the last several years); Sewell v. State, 592 N.E.2d 705, 707 (Ind. Ct. App. 1992) (considering the implications of *Brady* in holding defendant entitled to discover rape kit to conduct post-conviction testing because the testing was not available at trial); Commonwealth v. Brison, 618 A.2d 420, 425 (Pa. Super. Ct. 1992) (vacating conviction to allow defendant to conduct DNA analysis); People v. Callace, 573 N.Y.S.2d 137, 139 (N.Y. 1991) (classifying the testing as newly discovered evidence).

44. Mebane v. State, 902 P.2d 494, 497 (Kan. Ct. App. 1995).

45. *Development in Law, supra* note 41, at 1572.

have been treated in one of three ways by the court.[46] First, the defendant can bring a motion for a new trial based on newly discovered evidence.[47] Second, the defendant can bring a habeas petition.[48] A third possibility is that a defendant can claim that he has a right to exculpatory evidence. Each potential procedure for handling post-conviction DNA testing requests presents its own set of legal issues and procedural roadblocks.

1. Newly Discovered Evidence

One procedural path some courts have followed is to classify post-conviction DNA testing as "newly discovered evidence."[49] For example, in *People v. Callace*,[50] the New York court reasoned post-conviction DNA testing should be classified as newly discovered evidence because the type of DNA analysis available at the post-conviction stage was not available at the time of the trial, therefore making the evidence "new."[51] Similar reasoning followed in *Mebane v. State*.[52] Furthermore, New York has taken the lead and has written directly into their statute that post-conviction DNA test results should be classified as newly discovered evidence.[53]

Even in jurisdictions where courts have taken the first step and classified post-conviction testing as "newly discovered evidence," the testing is not easy to obtain. The application of "newly discovered evidence" to post-conviction DNA testing is a very narrow one. The narrow application makes it challenging for inmates to get the post-conviction DNA testing based on the theory of newly discovered evidence. This is especially the case in situations where some form of testing was available at trial and the defense did not use it. For example, in *Whitsel v. State*[54] the court found the post-conviction testing not to be newly discovered evidence because the defendant

46. *Id.*
47. *Id.*
48. *Id.*
49. *Mebane*, 902 P.2d at 497; People v. Callace, 573 N.Y.S.2d 137, 139 (N.Y. 1991).
50. 573 N.Y.S.2d 137(N.Y. 1991).
51. *Id.* at 139.
52. 902 P.2d at 497.
53. N.Y. CRIM. PROC. LAW §§ 440.10 Subd. 1(g), 440.30 Subd. 1-a (McKinney 1995).
54. 525 N.W.2d 860 (Iowa 1994).

did not use the testing that was available at the time of the trial.[55] Similarly, in *People v. Kellar*[56] the court was unwilling to grant a new trial because it found the post-conviction request for testing was not new evidence due to the fact that the defendant was fully aware of the testing at trial.[57]

According to the Iowa Supreme Court, newly discovered evidence must be relevant and likely to change the outcome of the case.[58] Furthermore, the court looks upon motions for new trials based on post-conviction DNA evidence with disfavor and does not grant motions liberally.[59]

A disadvantage to treating motions for post-conviction DNA testing as "newly discovered" evidence is timing. In thirty-three states, inmates have six months or less to file a motion based on new evidence.[60] In Minnesota, for example, a defendant must bring a motion for new trial based on newly discovered evidence within fifteen days of the verdict.[61] In most cases involving a request for post-conviction DNA testing, years have passed since their conviction, not months. Reasons for such short time periods in which to file a motion include the strong presumption that the verdict is correct due to the fact that the individual was convicted by a jury, the need for finality, the recognition that memories fade, witnesses disappear, and finally the need to conserve judicial resources by not opening the floodgates to meritless and costly claims.[62] Therefore, in most circumstances if the time limit has passed for filing a motion, it is beyond the scope of the court's authority and the court will not have the authority to order the testing.[63] One possible solution set forth in "Recommendations for Handling Requests" is to waive the time limit to file a motion based on new evidence in circumstances where the newly discovered evidence is DNA.[64] Further, the commission encourages prosecutors and judges to waive the time limit on a motion for a new trial based

55. *Id.* at 863.
56. 605 N.Y.S.2d 486 (N.Y. 1993).
57. *Id.*
58. *Whitsel*, 525 N.W.2d at 863.
59. *Id.*
60. Oppel, *supra* note 41.
61. MINN. R. CRIM. P. 26.04 (West 2000).
62. U.S. DEP'T OF JUSTICE, PUB. NO. 177626, *supra* note 19, at 9.
63. *Development in Law*, *supra* note 41, at 1572.
64. U.S. DEP'T OF JUSTICE, PUB. NO. 177626, *supra* note 19, at 54; Bailey, *supra* note 20.

on new evidence in certain circumstances.[65] The court should not waive the time limit in all circumstances, but rather scrutinize each request individually, especially if there have been significant advances in technology since the conviction.

2. *Does A Defendant Have A Constitutional Right To Demonstrate Actual Innocence Through Habeas Corpus Review?*

Essential to the discussion of habeas corpus petition and how it relates to a motion for post-conviction DNA testing is the holding in *Herrera v. Collins.*[66]

The issue in *Herrera* was whether a freestanding claim of innocence could be raised in a habeas corpus petition in view of either the Eighth Amendment protection against cruel or unusual punishment or the Due Process Clause of the Fourteenth Amendment.[67] Herrera claimed he could prove, through newly discovered evidence that he was actually innocent.[68] The *Herrera* court held that a claim of actual innocence absent a constitutional claim is not cognizable under either the Eighth or Fourteenth Amendments.[69]

The rule is that newly discovered evidence claims are not grounds for federal habeas corpus relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.[70] "The rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the constitution—not to correct errors of fact."[71]

Herrera has provided guidance to courts faced with claims of actual innocence grounded in post-conviction DNA testing. However, some courts have departed from the holding in *Herrera.* In *People v. Washington,*[72] the court addressed the issue of a constitu-

65. U.S. DEP'T OF JUSTICE, PUB. NO. 177626, *supra* note 19, at 54; Bailey, *supra* note 20.

66. 506 U.S. 390 (1993). Herrera was convicted of murdering police officer Carrisalez and sentenced to death in 1982. *Id.* at 393. Ten years after his conviction and after one habeas petition, Herrera filed another habeas petition claiming actual innocence. *Id.*

67. *Id.*

68. *Id.* at 396.

69. *Id.* at 400.

70. *Id.*

71. *Id.*

72. 665 N.E.2d 1330 (Ill. 1996). Washington, who was convicted of murder, filed a post-conviction motion under the Illinois Post-Conviction Hearing Act, claiming newly discovered evidence. *Id.* at 1332.

tional right implicated in a freestanding claim of innocence based upon new evidence at the post-conviction stage.[73] The court analyzed this issue under the federal habeas corpus and the Illinois state constitution. The Illinois court followed *Herrera* with respect to federal habeas corpus, but found that as a matter of Illinois constitutional jurisprudence, newly discovered evidence showing a defendant is actually innocent of the crime for which he was convicted is cognizable as a matter of due process.[74]

In *Summerville v. Warden*,[75] the Supreme Court of Connecticut held habeas corpus permits granting of a new trial pursuant to a petitioner's claim of actual innocence, notwithstanding a showing of a constitutional violation that affected fairness of criminal trial.[76] When evidence is so strong that innocence is highly likely and that evidence alone establishes innocence that should form in itself, a basis for habeas review of convictions and imprisonment.[77]

In *State v. El-Tabech*,[78] the time had passed to bring a motion for a new trial so the defendant tried to bring a habeas corpus petition, which was denied.[79] El-Tabech alleged his constitutional right to due process would be denied if he were unable to have DNA fingerprint testing conducted on the evidence.[80] Contrary to the courts in *Washington* and *Summerville*, the Supreme Court of Nebraska held the defendant could not bring a request under the post-conviction statute for DNA testing that would allegedly show actual innocence in absence of a showing of a constitutional viola-

73. *Id.* at 1332-37.

74. *Id.* at 1337.

75. 641 A.2d 1356 (Conn. 1994). Defendant was convicted of manslaughter in the first degree. *Id.* at 1358 n.1. The appellate court confirmed conviction. *Id.* at 1362. Summerville brought a habeas corpus petition claiming he was deprived of his rights to due process under the Fourteenth Amendment, and he alleged ineffectiveness of counsel. *Id.* The habeas court rejected his claims and he appealed. *Id.* at 1364. The appellate court affirmed in part, reversed in part, and remanded in part. *Id.* at 1356.

76. *Id.* at 1369.

77. *Development in Law*, *supra* note 41, at 1582.

78. 610 N.W.2d 737 (Neb. 2000). El-Tabech was convicted of first-degree murder and use of a weapon to commit a felony. *Id.* at 742. El-Tabech filed a post-conviction motion alleging ineffectiveness of counsel. The trial court dismissed the motion, and the appellate court upheld the dismissal. *Id.*

79. *Id.* at 745. A motion for a new trial based on newly discovered evidence must be brought within three years from the date of the verdict. NEB. REV. STAT. § 29-2101 (1995).

80. *El-Tabech*, 610 N.W.2d at 743.

tion.[81]

The case of Joseph O'Dell is yet another example of the inconsistencies demonstrated throughout jurisdictions when it comes to deciding whether a habeas petition should be granted solely on a claim of innocence.[82] After various procedural steps, O'Dell petitioned for a writ of habeas corpus to the Federal District Court of Virginia.[83] The court granted his petition, which was based solely on a claim of actual innocence.[84] However, the reasoning for the court accepting his claim of actual innocence is misleading. It was not because the court believed such a claim should be heard under a habeas corpus petition such as in *Washington* and *Summerville.* Rather, it was a statement issued by three Supreme Court justices that encouraged the court to hear his claims.[85] Then O'Dell appealed to the Fourth Circuit Court of Appeals where the court stated a claim of actual innocence was "not even colorable."[86] Furthermore, O'Dell appealed to the Supreme Court and the court refused to hear his argument on actual innocence.[87]

In some respects, the system is working towards obtaining justice by allowing post-conviction DNA testing in some circumstances. At the same time the system is taking what little opportunity a convict may have for justice away. Congress passed an anti-terrorism bill, which severely curtailed the right to obtain post-conviction habeas corpus relief in the federal courts.[88] Therefore,

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81. *Id.* at 749.

82. Urs, *supra* note 11, at 316.

83. *Id.* O'Dell had previously filed a petition for a writ of habeas corpus in the Circuit Court of Virginia Beach which was dismissed. *Id.* O'Dell then appealed to Virginia Supreme Court, which dismissed his appeal. O'Dell's writ of certiorari to the U.S. Supreme Court was also denied. *Id.*

84. *Id.* Although the Supreme Court denied O'Dell's petition for writ of certiorari, Justices Blackmun, Stevens and O'Connor did issue a statement expressing concern for O'Dell's matter. *Id.*

85. *Id.*

86. *Id.* at 317.

87. *Id.*

88. The bill provides:

> Strict time limits for filing a writ (1 year in non-death cases, 3 months in death cases) have been set for filing the writ; [s]tate court factual findings are "presumed to be correct"; [s]tate court misinterpretations of the United States Constitution are not a basis for relief unless those misinterpretations are "unreasonable"; and all petitioners must show, prior to obtaining a hearing, facts sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable fact finder would have found the petitioner guilty.

the holding in *Herrera* and the anti-terrorism bill work against a convict's chance of gaining the right to post-conviction DNA testing through a habeas petition.

3. Is There A Constitutional Right Under Brady*?*

In *Brady v. Maryland*,[89] the Supreme Court held that a defendant had a constitutional right to be informed of exculpatory evidence.[90] In *Brady*, the court was referring to evidence the state had before or during trial, not after trial.[91] However, a number of courts have attempted to make the leap even though a request for post-conviction DNA testing is "potentially exculpatory" rather than exculpatory and occurs after the trial rather than prior to the trial.[92]

In *Sewell v. State*,[93] the convict argued that principles of fundamental fairness required the state to release evidence when the evidence's exculpatory potential was discovered.[94] Relying on the analysis in *Brady*, the court agreed that in situations where the state possesses exculpatory evidence, the evidence is discoverable.[95] The court went on to say the *Brady* theory should only be relevant in cases where conviction rests largely on identification.[96] Similarly, the court in *Commonwealth v. Brison*[97] also cited to *Brady* and held the principles of justice required vacation of conviction and remand to trial court for DNA tests when conviction rested primarily on victim identification.[98]

In *Dabbs v. Vergari*,[99] the court cited *Brady*, "Notwithstanding the absence of a statutory right to post-conviction discovery, a defendant has a constitutional right to be informed of exculpatory information known by the state."[100] The New York courts are reach-

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U.S. DEP'T OF JUSTICE, PUB. NO. 161258, *supra* note 10, at xxxi.

89. 373 U.S. 83 (1963).

90. *Id.* at 87.

91. *Id.* at 84.

92. U.S. DEP'T OF JUSTICE, PUB. NO. 171626, *supra* note 19, at 11.

93. 592 N.E.2d 705 (Ind. App. 1992).

94. *Id.* at 707. Sewell made two claims, the first of which was a claim relying on the language in the Indiana Post-Conviction Rule 1 § 5 which provides that pretrial and discovery procedures are available in post-conviction proceedings. *Id.*

95. *Id.* at 708.

96. *Id.*

97. 618 A.2d 420 (Pa. Super. Ct. 1992).

98. *Id.* at 449.

99. 570 N.Y.S.2d 765 (N.Y. 1990).

100. *Id.* at 767.

ing the same result using different theories.[101] Later, in *People v. Callace*,[102] the court rejected *Brady*, but allowed the testing under the theory of newly discovered evidence.[103]

Whether a defendant tries to obtain post-conviction testing through a motion for a new trial based upon new evidence, a petition for habeas corpus, or the *Brady* argument, procedural uncertainties and inconsistencies exist which could ultimately bar a defendant's last chance to prove his innocence.

B. *Under What Circumstances Should Post-Conviction DNA Testing Be Granted?*

Once a court determines how to treat a request for post-conviction DNA testing, the court's next step is to determine when a request should be granted. Advocates for post-conviction DNA testing agree that testing should not be used in all circumstances, rather only in extraordinary circumstances. "It is only as powerful as it is relevant in a given scenario...it is not a magic bullet in post-conviction cases."[104] For example, if the evidence against a defendant is overwhelming and DNA evidence did not play a large part in the overall conviction, then the post-conviction testing should not be granted. However, if the prosecution won the conviction on eyewitness identification alone, then post-conviction testing should seriously be considered.

Moreover, several jurisdictions that have addressed the issue of post-conviction DNA testing agree that there are extraordinary circumstances where the testing should be granted. For example, in Pennsylvania, in *Commonwealth v. Reese*,[105] the court relied on their

101. *See generally Vergari*, 570 N.Y.S.2d at 765, 767, 769 (N.Y. 1998) (relying on *Brady*, court held evidence should be discoverable after trial); People v. Callace, 573 N.Y.S.2d 137, 137 (N.Y. 1991) (holding post-conviction DNA testing should be treated as newly discovered evidence).

102. 573 N.Y.S.2d at 137 (N.Y. 1991).

103. *Id.* at 139.

104. Raju Chebium, *DNA Provides New Hope for Wrongly Convicted Death Row Inmates, at* http://www.cnn.com/2000/LAW/06/16/death.penalty.dna.main/ (June 16, 2000) (quoting Chris Asplen, Executive Director of the National Commission on the Future of DNA Evidence, a national group run by the Department of Justice).

105. 682 A.2d 831 (Pa. Super. Ct. 1996). Robinson was convicted of rape and burglary in a bench trial. *Id.* at 833. Appellant appealed conviction and conviction was upheld. *Id.* Following appeal, Robinson filed a PCRA petition claiming ineffectiveness of counsel for failing to request DNA testing. *Id.* His petition was de-

earlier decision in *Brison* and stated that where the conviction rested on identification evidence, and where advanced technology could establish conclusive evidence of innocence, the motion for post-conviction testing should be granted.[106] Similarly, in *Dabbs v. Vergari*,[107] the court recognized that the testing Dabbs was requesting was not available at the time of trial. The court granted Dabbs the testing.[108] Additionally, in *Mebane v. State*,[109] the court said, "[I]t seems a matter of fundamental fairness that, under certain circumstances, a defendant be able to obtain post-conviction DNA testing."[110] However, the *Mebane* court also stated that the defendant was not entitled to post-conviction DNA testing of evidence as a matter of right and it should not be granted unless the trial court determines after a hearing that the result of the test would be potentially exculpatory.[111]

Instead of constructing a statute to address when and under what circumstances post-conviction DNA testing should be granted, South Dakota developed a set of guidelines in *Jenner v. Dooley*.[112] The South Dakota court became one of the few jurisdictions that established guidelines for when post-conviction DNA testing should be authorized. The guidelines set forth three elements that needed to be satisfied. First, the evidence and test results must meet the *Daubert* standard.[113] Second, the inmate must demonstrate that a favorable result using the latest scientific procedures would most likely produce an acquittal in a new trial.[114] Third, testing should not be allowed if it imposes an unreasonable burden on the state.[115] Recently, the court asserted these same guidelines in *Davi v.*

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nied and Robinson appealed to Superior Court. *Id.*

106. *Id.* at 837.

107. 570 N.Y.S.2d 765 (N.Y. 1990).

108. *Id.* at 769.

109. 902 P.2d 494 (Kan. Ct. App. 1995). A jury convicted Mebane of burglary, rape, kidnapping and sodomy. *Id.* at 494-95. Mebane brought motion to request post-conviction testing of rape kit–request was denied. *Id.* at 494. DNA testing was not available at time of trial. *Id.* at 495. *Mebane* is the first case where the Kansas Appellate Court has addressed a defendant's right to post-conviction DNA testing. *Id.* at 497.

110. *Id.*

111. *Id.* at 494.

112. 590 N.W.2d 463, 472 (S.D. 1999).

113. *Id.*

114. *Id.*

115. *Id.*

Class.[116] A Nebraska court in *State v. El-Tabech* also recognized the guidelines set in *Jenner.*[117]

As shown by the cases discussed above, courts are all over the board when it comes to deciding if a motion for post-conviction DNA testing should be granted. Moreover, it's not only the courts that can procedurally bar a defendant's right to post-conviction DNA testing, but prosecutors as well. Prosecutors are still skeptical of allowing post-conviction DNA tests. Prosecutors are encouraged to view requests with "great suspicion" for several reasons. First, prosecutors are concerned about a statute allowing any convict the right to post-conviction DNA testing—this would open the floodgates and encourage any convicted criminal to seek DNA testing, innocent or not.[118] Secondly, the principal of finality is important in our criminal justice system.[119] If courts are inconsistently deciding if post-conviction DNA testing should be granted and prosecutors are still skeptical about allowing the testing in the first place, the chances a convict will be granted the testing are once again not promising.

However, suggestions have been made to the courts on ways to evaluate each situation to determine whether post-conviction testing should be granted. First, when examining each request the court should consider whether the requested form of testing was available at the time of the convict's trial, whether significant strides in accuracy have been made since the judgment, and whether the technology is sufficiently advanced at the present time to justify a high degree of confidence in the results.[120] The suggestions, if followed, could help to minimize the inconsistencies from jurisdiction to jurisdiction and help to develop a precedent that can be followed in the future.

With biological evidence such as DNA testing, the courts have found post-conviction testing most suitable and beneficial to all

116. 609 N.W.2d 107, 112-13 (S.D. 2000) (applying the guidelines set in *Jenner*).

117. Justice Gerrard stated:

> [A] showing must be made that if the matter were presently tried, the defendant would be entitled to the testing and the results would be admissible ... and it must be shown that a favorable result using the latest scientific procedures would most likely produce an acquittal in a new trial.

State v. El-Tabech, 610 N.W.2d at 750 (Neb. 2000).

118. Oppel, *supra* note 41.

119. *Id.*

120. *Development in Law, supra* note 41, at 1574.

parties involved when the following elements are present: when the identity of a single perpetrator is at issue; the prosecution's evidence against the defendant is weak and therefore there is an element of real doubt of guilt; scientific evidence, if any, used to obtain the conviction has been impugned; and the nature of biological evidence make testing results on the issue of identity virtually dispositive.[121]

When courts are faced with the question of whether testing should be granted, the definitive question is, "do the tests carry any potential for showing exculpatory results?"[122] If the results are not likely to have an impact on the verdict then the request for testing should be denied.[123] However, if the answer is yes, the courts should strongly consider granting the request.

C. *What Happens When Post-Conviction Testing Proves To Be Exculpatory?*

The procedural uncertainties do not end once an inmate is granted post-conviction DNA testing. Courts are unclear and inconsistent when it comes to addressing post-conviction exculpatory DNA test results.[124] For example, Ronald Cotton spent nearly eleven years in prison before being exonerated based on post-conviction DNA testing.[125] He was cleared of all charges, released and received $5,000 from the state.[126] In *State v. Thomas*,[127] Thomas was granted post-conviction DNA testing.[128] The court clearly stated that the next procedural step would depend on the outcome. If the results confirmed guilt, the conviction would stand.[129] However, if the results were exculpatory, the court could either conduct a mo-

121. Jenner v. Dooley, 590 N.W.2d 463, 472 (S.D. 1999).
122. People v. Tookes, 639 N.Y.S.2d 913, 915 (N.Y. 1996).
123. *Id.*
124. *See generally* State v. Passino, 640 A.2d 547, 552 (Vt. 1994) (testing of DNA concluded two bloodstains did not match victim and two were inconclusive and as a result convict was granted new trial); Urs, *supra* note 11, at 322 (O'Dell did not receive a new trial despite testing that showed bloodstains were not that of the victims and some were inconclusive).
125. Barfield, *supra* note 17, at 11.
126. *Id.* Ronald Cotton has since become friends with the woman who was so sure he was her attacker. For more on this story see Helen O'Neill, *Perfect Witness*, MINNEAPOLIS STAR TRIB., Sept. 24, 2000, at A29.
127. 586 A.2d 250 (N.J. Super. Ct. App. Div. 1991).
128. *Id.* at 254.
129. *Id.*

tion in limine hearing on admissibility or order a new trial.[130] In some cases, once the exculpatory results are known, the defense moves for a new trial, the prosecutors decline to re-try the case, and the defendant is released.[131] In other cases, prosecutors decide to pursue a second trial.[132]

In the interest of justice, once test results prove exculpatory, the inmate should be released from prison. It should be that simple, but it is not. Contrary to what seems right, release from prison is not always simultaneous with exculpatory, post-conviction DNA test results.[133] For example, Ronald Jones post-conviction testing showed he was innocent of the crime, but he remained in prison on death row for some time following the exculpatory test results.[134] Until recently, Earl Washington Jr. was still in prison.[135] In 1994 his death sentence was commuted to life in prison when another DNA test strongly suggested, but did not prove his innocence.[136] Governor James Gilmore ordered new DNA tests in June of this year.[137] This time the DNA tests confirmed Washington's innocence and Gilmore granted Washington a full pardon.[138] Yet another example is Roy Wayne Criner who was denied a new trial after DNA tests showed he was not the source of semen found in the victim.[139] De-

130. *Id.*

131. U.S. DEP'T OF JUSTICE, PUB. NO. 161258, *supra* note 10, at 35, 40, 42.

132. *Id.* at 49. Prosecutors decided to pursue second trial against Gerald Wayne Davis. *Id.*

133. *Infra* notes 139-42 and accompanying text.

134. Ky Henderson, *How Many Innocent Inmates Are Executed?*, 24 HUM. RTS. Q 10, 11 (1997). Since Henderson's report, Ronald Jones has been released from prison. Sharon Cohen & Paul Shepard, *DNA Test Clears Scores of Felons*, MINNEAPOLIS STAR TRIB., Oct. 8, 2000, at A29. Ronald Jones was the twelfth inmate released from death row in the state of Illinois and the sixty-fourth person in the United States to be exonerated by post-conviction DNA testing. Judge Josephine Linker Hart & Guilford M. Dudley, *Available Post-Trial Relief After a State Criminal Conviction When Newly Discovered Evidence Establishes "Actual Innocence,"* 22 U. ARK. LITTLE ROCK L. REV. 629, 631 (2000).

135. Frank Green, *DNA Could Clear Rape, Murder Convict, at* http://www.apbnews.com/newscenter.../virginiatests 0418_01.html (n.d.). In addition to serving time for a murder he did not commit, Earl Washington is currently serving a thirty-year sentence for breaking and entering and the beating of a seventy year old woman. Nick Goldberg, *Wrongfully Convicted?, at* http://www. abcnews.go.com /onair/Nig.../n1000814_Capital_Punishment_E_Washington_Update.htm (n.d.).

136. Green, *supra* note 135.

137. Goldberg, *supra* note 135.

138. Associated Press, *Virginia Inmate Cleared by DNA Tests Gets Pardon* (October 2, 2000), *at* http://www.cnn.com/2000/LAW/10/02/dnatest.pardon.ap.

139. Cohen & Shepard, *supra* note 134, at A29.

spite the exculpatory results, the judge in the case reasoned that he could have worn a condom.[140] Two years later more DNA tests were conducted, and again showed Criner was innocent.[141] In August, after ten years in prison, Governor George W. Bush pardoned Roy Wayne Criner.[142]

New York is one of the few states, if not the only state, that has a statute addressing what a court can do when post-conviction DNA test results prove exculpatory.[143] The statute provides the court with the authority to vacate a judgment when the DNA evidence "is of such a character as to create a probability that had such evidence been received at trial the verdict would have been more favorable to the defendant."[144] The criminal justice system is beginning to understand the importance and the urgency in establishing procedures for granting the testing. Additionally, adopting a standard procedure for handling exculpatory results is just as important.

V. POST-CONVICTION TESTING IN MINNESOTA

A. *Admissibility Of DNA Evidence*

As early as 1952, the Minnesota Supreme Court acknowledged the federal standard set in *Frye v. United States.*[145] In 1980, Minnesota established an additional factor incorporating the *Frye* standard to determine the admissibility of scientific evidence.[146] The result was a two-part test. The first part of the test concentrated on acceptance within the relevant scientific community (the *Frye* standard).[147] The second part was developed from the case *State v. Mack* and required additional proof of reliability.[148] Because of the two-part test, the standard is often referred to as the *Frye/Mack* standard in Minnesota.

In 1993, the Supreme Court abandoned *Frye* and moved to the

140. *Id.*
141. *Id.*
142. *Id.*
143. N.Y. CRIM. PROC. L. § 440.10(1)(g)(McKinney 1995).
144. People v. Dabbs, 587 N.Y.S.2d 90, 92 (1991).
145. 293 F. 1013 (D.C. 1923). *See generally* State v. Kolander, 52 N.W.2d 458, 465 (Minn. 1952)(determining whether or not lie detector test was admissible, the court applied *Frye*).
146. Steven Terry, *Development*, 22 WM. MITCHELL L. REV. 237, 241 (1996).
147. *Id.*
148. 292 N.W.2d 764 (Minn. 1980); Terry, *supra* note 146, at 241.

Daubert standard.[149] Minnesota did not follow. Until recently, the Minnesota Supreme Court had not ruled on what standard to apply, and this created inconsistencies in the courts' decisions.[150] However, in *Goeb v. Tharaldson*, the Minnesota Supreme Court held that the *Frye/Mack* standard, not the *Daubert* standard, applies in determining whether new scientific evidence is admissible.[151] Essential to this discussion is not whether the court applies the *Frye* or *Daubert* standard, but that, as with all other jurisdictions, Minnesota courts have accepted the admittance of DNA evidence in criminal procedures.[152]

In 1989 the Minnesota Supreme Court applied the *Frye* standard specifically to the introduction of DNA evidence in a criminal trial.[153] The holding in *State v. Schwartz*[154] is additionally significant for two reasons. First, the court held that the admissibility of DNA evidence, even if it meets the *Frye/Mack* standard, depends upon the testing laboratory's compliance with standards and controls.[155] Second, the court affirmed the *Kim* limitation regarding statistical probability evidence.[156]

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149. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

150. Terry, *supra* note 146, at 241; Lorie Gildea, *Sifting the Dross: Expert Witness Testimony in Minnesota After the Daubert Trilogy*, 26 WM. MITCHELL L. REV. 93, 100-01 (2000). *See generally* Wesley v. Alexander, No. C0-96-613, 1996 WL 722084 (Minn. Ct. App. Dec. 10, 1996) (avoiding the issue of *Frye v. Daubert* altogether); Ross v. Schrantz, No. C8-94-1729, 1995 WL 254409, at *1 (Minn. Ct. App. May 2, 1995) (holding *Frye* standard still governed in Minnesota).

151. 615 N.W.2d 800, 814 (Minn. 2000). For further discussion on the holding reached in *Goeb* and its effect on Minnesota see Peter Knapp, *The Other Shoe Drops: Minnesota Rejects* Daubert, 27 WM. MITCHELL L. REV. 997 (2000).

152. U.S. DEP'T OF JUSTICE, PUB. NO. 177626, *supra* note 10, at 1. Minnesota Statute section 634.25 provides that:

> In a civil or criminal trial or hearing, the results of DNA analysis, as defined in section 299C.155, are admissible in evidence without antecedent expert testimony that DNA analysis provides a trustworthy and reliable method of identifying characteristics in an individual's genetic material upon a showing that the offered testimony meets the standards for admissibility set forth in the Rules of Evidence.

MINN. STAT. § 634.25 (1990).

153. State v. Schwartz, 447 N.W.2d 422, 423 (Minn. 1989) (holding admissibility of new scientific evidence is governed by *Frye* and DNA typing has gained general acceptance). *See also* State v. Finney, 448 N.W.2d 54, 55 (Minn. 1989) (holding electrophoretic typing of dried blood stains is admissible evidence under the *Mack/Frye* standard because the relevant scientific community widely shares the view that results from such testing are reliable and accurate).

154. 447 N.W.2d 422, 423 (Minn. 1989).

155. *Id.* at 428.

156. *Id.* at 429. The Minnesota Supreme Court held in *State v. Joon Kyu Kim*

B. *Requests For Post-Conviction DNA Testing*

Requests for post-conviction relief are not a new phenomenon to Minnesota courts.[157] However, requests for post-conviction relief based on DNA testing are new. In fact, *Wayne v. State* is one of the few cases, if not the only case, where a defendant has even requested post-conviction DNA testing.[158] It follows that there are no cases in Minnesota where a convict has been exonerated based on post-conviction DNA testing. Because Minnesota is not a death penalty state, the issue of post-conviction DNA testing is not as prevalent in Minnesota as it is in such states as Illinois and New York. Even so, the Minnesota legislature has already adopted a statute to specifically address post-conviction DNA testing.[159] This statute puts Minnesota ahead of many states in addressing post-conviction DNA testing.

Minnesota has not been faced with the requests that New York and Illinois have, so the courts have not had to address the procedural implications associated with such a request. However, *Wayne* may shed light on how the court would classify a request for post-conviction DNA testing. In *Wayne*, the post-conviction court allowed testing and in their opinion stated, "[D]NA testing only constitutes

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that "a limitation on the use of population frequency statistics is necessary because of the danger that such evidence will have a 'potentially exaggerated impact on the trier of fact.'" 398 N.W.2d 544, 548 (Minn. 1987).

157. *E.g.*, State v. Rewitzer, 617 N.W.2d 407, 407 (Minn. 2000) (arguing in post-conviction petition that fines and surcharges, imposed as part of the sentence, were in violation of the excessive fines provisions of the federal and state constitutions); King v. State, 562 N.W.2d 791, 794 (Minn. 1997) (filing petition for post-conviction relief did not entitle defendant to evidentiary hearing where he failed to cite disputed facts); Miller v. State, 531 N.W.2d 491, 492-3 (Minn. 1995) (filing of document titled "Ex Parte Application for Financial Assistance of Testing DNA Evidence" was treated as request for post-conviction relief); Santiago v. State, 617 N.W.2d 632, 634 (Minn. Ct. App. 2000) (bringing post-conviction motion claiming trial court abused its discretion in various ways).

158. Wayne v. State, 601 N.W.2d 440, 441 (Minn. 1999).

159. MINN. STAT. § 590.01 Subd. 1a (1996) provides that:

> Motion or fingerprint or forensic testing not available at trial. (a) A person convicted of a crime may make a motion for the performance of fingerprint or forensic DNA testing to demonstrate the person's actual innocence if: (1) the testing is to be performed on evidence secured in relation to the trial which resulted in the conviction; and (2) the evidence was not subject to the testing because either the technology for the testing was not available at the time of the trial or the testing was not available as evidence at the time of trial.

MINN. STAT. ANN. § 590.01 subd. 1a (1996).

new evidence from the standpoint that it further confirms appellant's guilt."[160] Because the court refers to the post-conviction test results as "new evidence" it may suggest that that is how the court intends to classify post-conviction DNA testing requests if presented with such a request in the future.

Historically, the Minnesota Supreme Court has allowed post-conviction relief in cases where there is newly discovered evidence that was not available at trial.[161] Since the court referred to the post-conviction DNA test results as "newly discovered evidence" the groundwork is there for future requests to be classified in the same manner.

Additionally, the Minnesota Supreme Court has granted new trials based on newly discovered evidence when the petitioner makes a showing that the evidence could not have been discovered through the exercise of due diligence prior to trial; that at the time of trial the petitioner and his counsel had no knowledge of such evidence; the evidence cannot be doubtful, cumulative, or impeaching and that it would probably produce a result different from or more favorable than that which actually occurred.[162] Evidence that is not cumulative or impeaching essentially means that the newly discovered evidence must be material.[163] Material evidence can be defined as evidence where there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.[164] Reasonable probability is defined as probability sufficient to undermine

160. *Wayne*, 601 N.W.2d at 441-42. The court was referring to the post-conviction test results, which were consistent with the tests done during trial and confirmed guilt. *Id.*

161. *See generally* State v. Gisege, 582 N.W.2d 229, 230 (Minn. 1998) (treating motion for post-conviction DNA testing as petition for post-conviction relief under MINN. STAT. § 590.01, subd. 1 (1996)); Miller v. State, 531 N.W.2d 491, 493 (Minn. 1995) (denying request for post-conviction relief because defendant's counsel had access to testing at trial); State v. Caldwell, 322 N.W.2d 574, 588 (Minn. 1982) (stating new trial may be granted based on newly discovered evidence if that evidence was not available at trial).

162. Sutherlin v. State, 574 N.W.2d 428, 434 (Minn. 1998); Hodgson v. State, 540 N.W.2d 515, 517 (Minn. 1995); Dale v. State, 535 N.W.2d 619, 622 (Minn. 1995); State v. Rainer, 502 N.W.2d 784, 789 (Minn. 1993); *Caldwell*, 322 N.W.2d at 588. *See also* Whitsel v. State, 525 N.W.2d 860, 863 (Iowa 1994) (following a similar standard).

163. *Dale*, 535 N.W.2d at 622.

164. Dabbs v. Vergari, 570 N.Y.S.2d 765, 767 (N.Y. 1990).

confidence in the outcome.[165]

It will be interesting to see how Minnesota courts address a request for post-conviction DNA testing in the future, how the court will treat such a request procedurally, and, further, what the court will do if the results prove to be exculpatory.

VI. WHAT STEPS ARE BEING TAKEN TO PREVENT MORE INNOCENT PEOPLE FROM BEING WRONGFULLY CONVICTED?

A. *Post-Conviction DNA Testing: Recommendations For Handling Requests*[166]

After the release of the U.S. Department of Justice Report, the National Commission on the Future of DNA Evidence was established.[167] This commission was put together at the request of Attorney General Janet Reno to "identify ways to maximize the value of DNA in our criminal justice system."[168] The report outlines recommendations for prosecutors, defense counsel and judges on how requests for post-conviction DNA testing should be handled.[169] According to Peter Neufeld, "the biggest problem with the report is that they are only recommendations...[p]rosecutors don't have to follow them if they don't want to."[170] However, it is a starting point for those jurisdictions that do not have a statute mandating such a procedure. The report also lays out each participant's role in the process.[171] Furthermore, the report discusses the legal and biological issues involved in a request for post-conviction testing, some of which have been discussed above.[172]

165. *Id.*

166. U.S. DEP'T OF JUSTICE, PUB. NO. 177626, *supra* note 19.

167. *Id.* at v. The Honorable Shirley S. Abrahamson, Chief Justice of the Wisconsin State Supreme Court, chairs the commission. *Id.* The commission is made up of prosecutors, defense attorneys, law enforcement, individuals from the scientific community, individuals from the medical examiner community, academic professionals and victims' rights organizations. *Id.*

168. *Id.* at iii.

169. *Id.*

170. Bailey, *supra* note 20. Approximately one-half of the cases overturned using DNA involve prosecutorial or police misconduct. *Id.*

171. U.S. DEP'T OF JUSTICE, PUB. NO. 177626, *supra* note 19.

172. U.S. DEP'T OF JUSTICE, PUB. NO. 177626, *supra* note 19, chapters 2, 3.

B. *The Innocence Protection Act*

Congress is also addressing the issue of post-conviction DNA testing, specifically in situations involving the death penalty. Vermont Senator Patrick Leahy introduced the Innocence Protection Act in Congress this year.[173] The Innocence Protection Act would give death row inmates the right to DNA tests.[174] Specifically, to tests that were not available at the time they were convicted due to technology.[175] Additionally, the Act seeks to apply DNA test results to capital cases prosecuted before 1994.[176] This particular aspect of legislation is especially important given the finality of sentencing an innocent person to death.

Since the United States reinstated the death penalty in 1976,[177] over 6,000 prisoners have been sentenced to death.[178] "DNA evidence is rising in importance as a tool to exonerate innocent inmates facing execution."[179] Moreover, DNA testing, along with growing concern that there are innocent people on death row, has decreased the public's support of capital punishment.[180] Those against the death penalty claim a reason most states do not already have legislation in place to allow post-conviction testing is because legislatures fear the time prisoners spend awaiting execution would increase.[181]

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173. Chebium, *supra* note 104. The Innocence Protection Act appears to be dead in its present form. James D. Polley, *Innocence Protection Act*, PROSECUTOR 16, 16 (Nov.-Dec. 2000). Senator Leahy is working to re-draft the bill. *Id.*

174. The Innocence Protection Act also includes provisions to increase federal funds for state and local prosecutors involved in death penalty cases, discretionary appellate and annual review processes and other procedural items intended to ensure defendants are granted fair access to the courts. *Bipartisan Group of Senators Seek Changes in Death Penalty Procedures, at* http://www.cnn.com/ 2000/ ALLPOLITICS/stories/06 /07/death.penalty/index.html (June 7, 2000) [hereinafter *Bipartisan Group of Senators*].

175. *Id.*

176. *Id.*

177. Montgomery, *supra* note 4. Thirty-eight states have the death penalty; the twelve states that do not are: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia and Wisconsin. Raju Chebium, *Reports of a Flawed Legal System Push Death Penalty Debate Into High Gear, at* http://www.cnn.com/LAW/trials.and.cases/case.files/0006/death penalty/overview.html. [hereinafter Chebium, *Reports of a Flawed Legal System*].

178. Montgomery, *supra* note 4.

179. Chebium, *supra* note 104.

180. *Bipartisan Group of Senators, supra* note 174.

181. Chebium, *supra* note 104.

C. *Death Penalty Moratorium*

Any time an innocent person is convicted and sentenced to prison, our criminal justice system has failed. Any time an innocent person is sentenced to die and executed, our criminal justice system has failed miserably. At least the first situation allows an opportunity to correct the injustice. DNA testing has not only increased awareness of its importance within the criminal justice system, it has also raised questions about how these people were wrongly convicted in the first place, especially those who received the death penalty. Since the death penalty was reinstated, eighty-five inmates have been proven innocent and released from death row, thirteen releases occurred in Illinois alone.[182] DNA evidence played a key role in eight of those releases.[183]

In the beginning of 2000, Illinois governor, George Ryan, banned all executions indefinitely.[184] Illinois was the first state to ban executions, but not the last.[185] Since Governor Ryan declared a moratorium in Illinois, thirty-eight states have declared moratoriums.[186] Early this year, five Pennsylvania senators introduced Senate Bill 952, which would halt executions in Pennsylvania for two years while a study is conducted.[187]

D. *Enactment of Statutes Long Overdue*

Several state legislatures are working to develop statutes to address requests for post-conviction DNA testing. In addition to the moratorium in Illinois, the Illinois legislature passed a bill that would require evidence in sex cases to be preserved for twenty-five years and for seven years in all other felonies.[188] Similarly, in June

182. Marcus Rediker, *Public Forum to Examine Death Penalty and Proposed Moratorium*, 2 NO. 6 LAW. J. 4, 4 (March 24, 2000). *But see* Chebium, *supra* note 104 (stating that eighty-seven death row inmates have been exonerated); Chebium, *Reports of a Flawed Legal System*, *supra* note 177 (stating eighty-seven inmates have been released from death row).

183. Chebium, *supra* note 104.

184. Chebium, *Reports of a Flawed Legal System*, *supra* note 177.

185. *Id.*

186. Rediker, *supra* note 182, at 4.

187. *Id.* The study would look at whether race plays a role in sentencing one to death, whether death-row inmates have adequate representation and whether the death penalty is applied fairly and uniformly state wide. *Id.*

188. Amy Worden, *Bill Would Preserve Murder Evidence Forever, at* http://www.apbnews.com/cjsystem/findingju.../evidence 0616_01.html (June 16, 2000). Gov-

of this year Senator Rodney Ellis, of Texas, introduced a bill that would allow inmates to petition the court for post-conviction DNA testing.[189]

New York has been at the forefront of post-conviction DNA testing from the beginning. The latest efforts from New York include the establishment of the DNA Review Committee.[190] Governor Pataki commissioned the committee to "investigate cases of inmates locked up for crimes they claim they didn't commit."[191] The committee is expected to shape policies while maximizing the use of DNA testing.[192]

E. The Innocence Project

The Innocence Project is leading the crusade in the use of post-conviction DNA testing to exonerate the innocent.[193] Barry Scheck and Peter Neufeld founded the Innocence Project in 1992.[194] The Innocence Project is a clinical program that provides pro bono legal assistance to inmates who are challenging their convictions.[195] Specifically, the Innocence Project focuses on using DNA evidence to assist inmates in proving their innocence.[196]

The Innocence Project is also involved in drafting legislation that would make it easier for inmates to access post-conviction DNA testing.[197] Specific elements of the proposed legislation include al-

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Governor Ryan had until June 27, 2000, to sign the bill. *Id.*

189. Jim Yardley, *Texas Lawmakers Seek Wide DNA Testing,* N.Y. TIMES, June 9, 2000, at A18.

190. Joe Mahoney, *Government DNA Crime Panel To Review Convictions, at* http://www.nydailynews.com/2000-05-08/News_and_Views/Beyond_the_City/a-65933. asp (May 8, 2000).

191. *Id.*

192. *Id.*

193. Chebium, *supra* note 104.

194. Cardozo Law Innocence Project, *at* http://www.cardozo.yu.edu /innocence_project/index.html. The Innocence Project is based at Yeshiva University's Benjamin N. Cardozo School of Law in New York. *Id.* Neufeld and Scheck are former public defenders from the South Bronx. Montgomery, *supra* note 4. Additionally, Scheck and Neufeld co-chair the National Association of Criminal and Defense Lawyers (NACDL) DNA Task Force. Wessling, *supra* note 36. Barry Scheck is a former member of O.J. Simpson's defense team. Montgomery, *supra* note 4.

195. *See supra* note 194 and accompanying text.

196. Bailey, *supra* note 20.

197. Cardozo Law Innocence Project, *supra* note 194. Peter Neufeld and Barry Scheck also propose that the government pay for the post-conviction testing. Bailey, *supra* note 20.

lowing DNA testing in cases where the defendant will pay for the DNA test out of his own pocket, doing away with the time limits on new trials when DNA evidence has exculpatory potential, and preserving biological evidence for as long as the inmate is in prison.[198] Preservation of biological evidence is extremely important and a hard issue to sell. "Prosecutors and state officials are under political pressure to reduce crime, as well as those with a firm belief in finality, may feel induced to destroy evidence as soon as the appeals process is initially exhausted."[199] The reality is that the Innocence Project turns down about seventy percent of requests from inmates due to the evidence being lost or destroyed.[200]

The numbers presented by the Innocence Project are alarming because one wrongly convicted person is one too many. However, the numbers also show just how far the Innocence Project has come and what a difference they are making. For example, in 1995 the Innocence Project claimed they had exonerated eight prisoners based on DNA.[201] To date, the number of inmates the Innocence Project has helped is substantially larger. Exactly how many inmates the Innocence Project has helped exonerate to date varies, depending on the source. The number of inmates varies anywhere from thirty-eight to sixty-five inmates nationwide.[202] Most cases involved a situation where the DNA technology available today was not available at the time of trial.[203] Moreover, Neufeld and Scheck state that every year since 1989, DNA results have excluded about twenty-five percent of the FBI's primary suspects in sexual assault cases.[204] The

198. Bailey, *supra* note 20.

199. Urs, *supra* note 11, at 316.

200. ABA Network, *at* http://www.dna testing in/journal/ may00/03ldna.html

201. Filocoma, *supra* note 2, at 567 n.20.

202. Bailey, *supra* note 20. *But see* Barfield, *supra* note 17, at 35 (stating DNA analysis has exonerated forty-eight prisoners, including twelve on death row). Angels of Justice reports the Innocence Project has represented thirty-eight individuals who have been exonerated based on DNA evidence. Montgomery, *supra* note 4. An article by Joe Mahoney states the Innocence Project has used DNA to free sixty-four inmates. Mahoney, *supra* note 190. Yet another article addresses the number in general terms stating the Innocence Project has helped free over three dozen wrongly convicted inmates using DNA since 1992. Zitrin, *supra* note 36. The Innocence Project is currently handling about 200 cases and has a backlog of 1,000 cases. Chebium, *supra* note 104.

203. Bailey, *supra* note 20.

204. U.S. DEP'T OF JUSTICE, PUB. NO. 161258, *supra* note 10, at xxviii. For more information, see ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION, AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED, by Barry Scheck, Peter Neufeld and Jim

Innocence Project has clearly demonstrated DNA testing is a powerful tool to exonerate those already convicted.

F. Creation Of DNA Databanks

In 1994, Congress passed the DNA Identification Act.[205] This Act authorizes the attorney general to grant money to states to develop DNA databases.[206] In order for a state to obtain grant money, the state is required to collect DNA from felony sexual offenders.[207] In addition to the minimum requirement to collect DNA from felony sex offenders, states may require additional criminals to submit to DNA testing to add to the databank.[208] The crimes to be included and the specifics vary from state to state.[209] The state of Minnesota has the broadest approach because it does not state specifically what crimes should be included.[210] This leaves the door wide open. It is possible that at some point in time Minnesota will

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Dwyer. ACTUAL INNOCENCE details the stories of ten men imprisoned after being wrongfully convicted. *See also* Tanner, *supra* note 4.

205. Barfield, *supra* note 17, at 7.

206. *Id.*

207. *Id.*

208. *Id.* at 35.

209. *Id.* For example, Arkansas requires repeat offenders to submit to testing and Wisconsin requires samples from each person who is incarcerated, on probation, paroled, or found not guilty by reason of mental disease. *Id.* Louisiana, Mississippi and Kentucky require samples from those arrested for sexual felony offenses, but not necessarily convicted. *Id.*

210. *Id.* MINN. STAT. § 299C.09 (1999) provides that:

> The bureau shall install systems for identification of criminals, including the fingerprint system, the modus operandi system, the conditional release data system, and such others as the superintendent deems proper. The bureau shall keep a complete record and index of all information received in convenient form for consultation and comparison. The bureau shall obtain from wherever procurable and file for record finger and thumb prints, measurements, photographs, plates, outline pictures, descriptions, modus operandi statements, conditional release information, or such other information as the superintendent considers necessary, of persons who have been or shall hereafter be convicted of a felony, gross misdemeanor, or an attempt to commit a felony or gross misdemeanor, within the state, or who are known to be habitual criminals. To the extent that the superintendent may determine it to be necessary, the bureau shall obtain like information concerning persons convicted of a crime under the laws of another state or government, the central repository of this records system is the bureau of criminal apprehension in St. Paul.

MINN. STAT. § 299C.09 (1999).

require those convicted of any crime to submit DNA samples. Although this is an extreme scenario, it demonstrates the potential for state DNA databanks. As a result of the databases holding more and more DNA samples, DNA databanks will grow to be a powerful a tool for law enforcement.

In fact, examples already exist of how important the DNA databanks can be in solving crimes and even in assisting to exonerate the innocent. Florida claims to have made 200 "cold hits" and Virginia claims to have made seventy-eight cold hits using their respective DNA databases.[211] Ronald Cotton was freed after DNA tests proved he was not the right man.[212] Investigators found the right man when DNA from the crime scene matched that of another convict's DNA in the state's DNA database.[213] Additionally, Clyde Charles was released in December of 1999 after DNA tests showed he was wrongly convicted.[214] As it turns out, his brother was guilty of the crime.[215] Marlo Charles' DNA was in the Virginia databank from a crime he committed in 1992.[216] Police were able to match his DNA stored in the databank to the semen taken from the victim.[217]

In Minnesota, database searches have yielded results. In *State v. Bloom*, the BCA prepared a DNA profile from the crime scene and ran a search in the sex-offender DNA database, which identified the defendant as a possible suspect.[218] Bloom was convicted of first degree burglary, first degree criminal sexual conduct and kidnapping.[219] In *State v. Perez*, searches of the sex-offender DNA database isolated the defendant as a suspect.[220] As a result, the defendant was convicted of murder and sentenced to life in prison without parole.[221]

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211. Bailey, *supra* note 20. A "cold hit" is when police have no leads and they find a suspect by comparing the DNA profile found at the crime scene with DNA profiles in the databases. *Id.*

212. Barfield, *supra* note 17, at 11.

213. *Id.*

214. Zitrin, *supra* note 36.

215. *Id.*

216. *Id.*

217. *Id.*

218. State v. Bloom, 516 N.W.2d 159, 161 (Minn. 1994).

219. State v. Bloom, No. C8-95-218, 1996 WL 33092, at *2 (Minn. Ct. App. Jan. 30, 1996).

220. State v. Perez, 516 N.W.2d 175, 176 (Minn. 1994).

221. *Id.* at 176.

All of the state databases are in the process of being linked to a national database called the National Combined DNA Identification System ("CODIS").[222] Once this process is complete, the databases will be all the more powerful to law enforcement.

VII. CONCLUSION

The criminal justice system has come a long way since allowing DNA evidence in criminal proceedings. Scientific evidence has come a long way since the genetic marker analysis of the 1960's. Together, a powerful tool has been developed to incarcerate the guilty and exonerate the innocent. With the number of innocent individuals who have been convicted in recent years, there is no just reason why our system should not take advantage of the scientific advances afforded to our society in order to ensure that the right person is convicted.

222. Barfield, *supra* note 17, at 7.

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